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CITATIONS

772844—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 477

JOHN PORTER MONROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 815–823) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 14, 1947 (R. 824). The petition for a writ of certiorari was filed December 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a clause of the trial court's instructions on accomplice testimony, to the effect that an alleged co-conspirator's testimony as a government witness established that he was a co-conspirator, was susceptible of being construed as a charge that the evidence showed the existence of a conspiracy between petitioner and the witness.

2. Whether the trial cort's instructions disregarded the principle of strict construction of criminal statutes and regulations.

3. Whether the trial court erred in submitting to the jury, at their request, a copy of the indictment, in which petitioner was named as "Monroe Kaplan alias 'John Porter Monroe,'" after instructing them to disregard the use of the alias.

STATUTE, REGULATION AND RULES INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. V, 901 *et seq.*, provided in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will

be generally fair and equitable and effectuate the purposes of this Act. * * *

* * * * *

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Maximum Price Regulation No. 127, issued April 27, 1942 (7 Fed. Reg. 3119), provided in pertinent part:

SEC. 1400.71. *Maximum prices for finished goods.*— * * * no person shall sell or deliver finished piece goods * * * at prices higher than the maximum prices set forth in * * * Section 1400.82; * * *.

SEC. 1400.74. *Evasion.*—The price limitations set forth in this Maximum Price Regulation No. 127 shall not be evaded,

whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to finished piece goods, alone or in conjunction with any other commodity or by way of commission, service, transportation, or other charge, or discount, premium or other privilege, or tying-agreement or other trade understanding, or otherwise."

The Federal Rules of Criminal Procedure provide in pertinent part:

> Rule 30. *Instructions.* — * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *
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> * * * * * *
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> Rule 52. *Harmless Error and Plain Error.*—(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On October 11, 1945, an indictment in thirty counts was returned in the District Court for the Southern District of New York against petitioner,

Harrison A. Biggi, Gilbert Verney, Verney Mills Inc., and Verney Fabrics Corporation. The first count charged that the five named defendants "and Abner Berman, not named as a defendant herein but as a co-conspirator," had conspired with each other and with divers other unknown persons to violate the Emergency Price Control Act (R. 9–11). The other twenty-nine counts charged the five defendants with various sales of finished piece goods at prices in excess of those allowed by the Emergency Price Control Act and by the regulations duly adopted pursuant thereto (R. 11–31).

After the presentation of the Government's case, the court dismissed the indictment as to Gilbert Verney because of insufficiency of the evidence (R. 456, 744), and count 12 was dismissed by the Government as to all the defendants (R. 449, 745). The jury acquitted Biggi and the two corporations on all counts, but petitioner was found guilty on the conspiracy count and the remaining substantive counts (R. 763). Petitioner was sentenced to two years imprisonment on the conspiracy count; to three consecutive six-month terms on counts 2, 3, and 4, to run concurrently with the sentence on count 1; and to separate terms of six months on each of the remaining counts, to run concurrently with each other and with the sentence on count 1. In addition, fines aggregating $100,000 were imposed upon petitioner. (R. 766, 767, 808–809.) The

judgment was affirmed by the Circuit Court of Appeals for the Second Circuit.[1]

ARGUMENT

1. Petitioner contends that the trial court's instructions to the jury in effect directed a finding as to an essential element of the charge of conspiracy (Pet. 7–8, 13, 14, 15–20). The challenged portion of the instructions is as follows (R. 756–757):

> Berman was an accomplice. Berman is the gentleman who was named as a conspirator but not indicted as a defendant. He was an accomplice. The indictment charges him as a co-conspirator, and his evidence establishes it conclusively. So are the others who made purchases at over-ceiling prices, if you are satisfied that the purchases were actually in violation of the Maximum Price Regulation under the circumstances under which they were made, because the Regulation also makes it illegal to purchase at over-ceiling prices. The testimony of accomplices should be subjected to very careful scrutiny because of their participation in the offense charged and because of the possible interest that they may have in the case.

Petitioner argues that the only conspiracy on which his conviction can be sustained is a conspiracy between himself and Berman; that the

[1] The facts are largely undisputed and are delineated in the opinion below (R. 816–817). See also pp. 9–10, *infra*.

existence of an illegal agreement is an essential element of the offense of conspiracy; and that the court, in charging the jury that Berman's testimony established "conclusively" that he was a co-conspirator, in effect instructed them that the existence of an illegal agreement was established by the evidence.

The alleged error was never called to the attention of the trial court. Consequently, it presents no ground for reversal unless it plainly affected petitioner's substantial rights. Rules 30 and 52, F. R. Crim. P., *supra; Palmer* v. *Hoffman,* 318 U. S. 109, 119; *Johnson* v. *United States,* 318 U. S. 189, 200.

We think the circuit court of appeals was correct in holding that in the light of the instructions as a whole, the clause objected to had no effect upon the jury's decision. The charge extends over sixteen pages of the record (R. 744–759), on the thirteenth of which appears the questioned passage. In the earlier portions of the charge, in which the pertinent rules of law were discussed, the court repeatedly (R. 746, 747, 748, 749) warned the jury that they must consider, in the case of each separate defendant, whether there was a conspiracy as charged in the indictment and whether that particular defendant participated. So, for example, the court stated (R. 748–749):

> In this case therefore, you must put together all of the evidence of the various

> transactions of these defendants and after a careful consideration of the evidence, make your determination first whether or not there was a conspiracy or a general unity of purpose, and if so, secondly, whether or not each particular defendant participated in the conspiracy with knowledge of it.

The court next turned to a discussion of the evidence in the case, and here the jury were advised several times (R. 751, 752, 753, 754) that they could not convict petitioner unless they were convinced by the evidence that he had entered into an illegal agreement. For instance, the court said (R. 754):

> The question for your determination is, were these circumstances sufficiently conclusive to convince you beyond a reasonable doubt, that Monroe was in reality using this method of dealing with purchasers to dispose of the piecegoods of these corporations in active cooperation with them with their consent, either expressed or implied? If so, Monroe's charges were properly a part of the selling price and this method of procedure which resulted in prices in excess of the ceiling, was in violation of the Maximum Price Regulation. If not, that is, if Monroe was acting independently for the purchasers, even though the corporations extended courtesies to him in the way of filling orders of customers proposed by him, that would not amount

> to a violation of the Maximum Price Regulation, even though Monroe's charges might seem high or even unconscionable.

At this point the court cautioned the jury to scrutinize carefully the testimony of Berman, who, by his own admission, was an accomplice. Buried in the middle of this paragraph is the challenged clause. It will be noted that the overall effect of the paragraph is, not that any material issue has been settled by Berman's evidence, but rather that all of his testimony was suspect. Finally, the court concluded its charge by telling the jury that they were the sole judges of the facts and that they should be governed by their own recollection of the evidence and not by what the court or counsel had told them (R. 759). We think it clear that the jury was not confused, and that it affirmatively appears from the record that petitioner's substantial rights in this regard were fully protected in the instructions quoted above. See *Bihn* v. *United States*, 328 U. S. 633, 638.

2. Petitioner also contends that the court in instructing the jury failed to construe strictly the criminal provisions of the Emergency Price Control Act and the regulations involved here (Pet. 8–10, 13, 14, 21–31). The Government's evidence showed that petitioner told Berman that he could supply finished piece goods from a big mill for dress manufacturers; that Berman found manufacturers who wanted to buy and gave the infor-

mation to petitioner; that petitioner then obtained contracts for the goods from Verney Fabrics Corporation at the ceiling price; and that the manufacturers were also required to pay 30 cents a yard over the ceiling price to petitioner[2] (R. 143–197). The court instructed the jury that if they found that petitioner was acting in behalf of the sellers and if the selling price, including petitioner's fees, was in excess of the ceiling price a violation of Maximum Price Regulation No. 127, *supra,* had been committed (R. 752). Petitioner argues that under a strict construction of the regulation and the Emergency Price Control Act there was nothing which required a ruling that the amount paid by the buyer to the seller's agent, plus the amount paid by the buyer to the seller, should not exceed the seller's maximum price.

We agree with the circuit court of appeals that such conduct was plainly covered by the evasion section of the regulation, which specifically provided, "The price limitations set forth in this Maximum Price Regulation No. 127, shall not be evaded, * * * by way of commission * * *." Sec. 1400.74, *supra.* Petitioner's argument rests upon the proposition that where the buyer paid the seller's agent for services rendered by the latter to the seller in connection with the sale,

[2] Petitioner did not take the stand and offered no proof to rebut the Government's evidence. His only witnesses were character witnesses.

such payment was not, under the regulation, a part of the sale price. We find it difficult to imagine a case which is more obviously an evasion "by way of commission." The principle of strict construction does not require nullification of the evident purpose of the regulation. *United States* v. *Gaskin*, 320 U. S. 527, 528–530.

Petitioner argues (Pet. 26–29) that the regulation, as it stood at the time of the indictment in October 1945, could not have been intended to make the amount paid by the buyer to the seller's agent a part of the seller's maximum price, because the regulation was later amended to provide for that specific case.[3] But the amendment, we submit, was simply intended to broaden the prohibition against evasion to include the payment of commissions to the buyer's agent, as well as the already clearly prohibited payment to the seller's agent. This is clear from the Administrator's statement of the considerations which prompted the amendment, 11 Fed. Reg. 13166, November 6, 1946:

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[3] On November 5, 1946, Maximum Price Regulation No. 127 was amended, 11 Fed. Reg. 13149, 13165, to read as follows:

"SEC. 1400.88. *Treatment of brokers' compensation.*—(a) Brokers considered sellers' agent. Every broker shall be considered as the agent of the seller and not the agent of the buyer. In each case the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller's maximum price. The term 'broker' includes 'finder,' a 'buyer's agent' and 'seller's agent.'"

> The maximum prices established in Maximum Price Regulation No. 127 include an amount designed to compensate sellers for customary sales expense paid in the form of commissions or otherwise. Prior to the inception of price control it was not the practice of the industry to make use of buyers' agents. Since price control, however, brokers, agents and finders have entered this field and have attempted to charge the purchaser their commissions over and above the seller's ceiling price. As a result, pressures on the buyer's ceiling prices are created, and in many cases the effect has been to stimulate evasion of applicable maximum price regulations.

The natural and normal meaning of the original evasion paragraph was that the payment of commissions to the seller's agent in excess of the maximum price was forbidden. Payment of such commissions to the buyer's agent was not so obviously included and later had to be set forth with more certainty.

Petitioner's reliance upon *Kraus and Bros.* v. *United States,* 327 U. S. 614, is unavailing. In that case the alleged evasion of the Emergency Price Control Act was by means of a tie-in sale involving secondary products which had value and were sold at their market price. This Court held that such sales were not definitely prohibited by the Administrator's regulation against evasion, although they would have been if the secondary

products had been worthless or sold at artificial prices. We think the case is clearly distinguishable from the present situation in which there is a specific provision against evasion "by way of commission." Cf. *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869.

3. Petitioner's final contention is that the trial court erred in submitting a copy of the indictment to the jury, at their request, during their deliberations, thus revealing to them for the first time that petitioner had been indicted as "Monroe Kaplan alias 'John Porter Monroe'" (Pet. 10–11, 13, 14, 31–36). But the court carefully instructed the jury that petitioner had legally changed his name, and that they were to attach no criminal significance to the alias nor permit it to influence them to petitioner's prejudice (R. 761–762). Petitioner now contends that the jury should have been affirmatively instructed that he had no prior criminal record. In view of the fact that the court explained the innocent origin of the alias, we think this further instruction was unnecessary. Moreover, it was not specifically requested at the time. We agree with the circuit court of appeals that unnecessary aliases should not be included in indictments, but in our opinion the court's instruction in this case precluded any inference of criminal record and prevented any possible prejudice.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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